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No. 87-865

In the Supreme Court of the United States

OCTOBER TERM, 1987

GREGORY LUMBER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner assumed the risk that the amount of timber that it harvested under contracts with the government would be less than the government's estimate.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is reported at 831 F.2d 305 (Table). The opinion of the United States Claims Court (Pet. App. A4-A45) is reported at 11 Cl. Ct. 489.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1987. The petition for a writ of certiorari was filed on November 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was the successful bidder at auctions for the sale of standing timber on 12 tracts in National Forest lands near Eugene, Oregon. As the result of being the suc-

cessful bidder, petitioner entered into 12 separate contracts with the Bureau of Land Management (BLM) for the purchase of uncut timber. The cumulative price was approximately $8.4 million. Pet. App. A9-A12.

Prior to the bidding, BLM gave petitioner documents that included estimates of the amount of timber. These documents stated that the estimates were made solely as an administrative aid for determining bonding requirements and the timing of payments. The standard BLM bid form given to petitioner stated as follows (Pet. App. A26):

> If timber sale contract is executed, undersigned is liable for total purchase price even though the quantity of timber cut, removed, or designated for taking is more or less than the total estimated volume or quantity shown above.

The executed contracts reconfirmed that petitioner was liable for the full price even if the actual quantity of timber was less than the estimates. Exhibit B of each contract stated (Pet. App. A25 (emphasis omitted)) that "[p]urchaser shall be liable for total purchase price even though quantity of timber actually cut or removed or designated for taking is less than the estimated volume." And section 6 of each contract provided as follows (*id.* at A24-A25 (emphasis omitted)):

> (a) Purchaser warrants that this contract is accepted and executed on the basis of its [purchaser's] examination and inspection of the timber sold under this contract and its opinion of the value thereof.
>
> (b) Government expressly disclaims any warranty of fitness of timber for any purpose; all timber sold hereunder is accepted *As Is* (in original) without any warranty of merchantability by Government. Any warranty as to the quantity or quality of the timber

sold hereunder is expressly disclaimed by Government.

Petitioner alleges that the amount of timber harvested under the 12 contracts was 26% less than the aggregate estimated amount. Petitioner filed 12 cases in the Court of Claims to recover the difference in value between the estimated and actual harvests.

2. In one of the 12 cases, the Court of Claims granted the government's motion for summary judgment; it held that, under the contracts, petitioner bore the risk that the estimates were high. See 230 Ct. Cl. 1041 (1982). The court based its holding on the lack of any government warranty of quantity and petitioner's statement in the contracts that its purchase was based upon its own examination of the timber.

Petitioner then amended its claims in the remaining eleven cases to add allegations of bad faith, misrepresentation and unconscionability (Pet. App. A14). The Claims Court, successor to the Court of Claims, permitted extensive discovery on petitioner's new allegations. After an exhaustive review of the record, the Claims Court granted the government's motion for summary judgment in nine of the 11 cases. *Id.* at A44.[1] The court held that there was "the total absence in this case of specific material facts sufficient to even raise such issues as bad faith, misrepresentation, or unconscionability beyond the category of mere allegations" (*id.* at A29). The court of appeals affirmed in a per curiam order adopting the Claims Court's opinion (*id.* at A1-A2).

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[1] The court granted partial summary judgment in the two remaining cases, which involved issues that are not relevant to the petition.

ARGUMENT

The lower courts' interpretation of the contracts and review of the factual record are correct. Moreover, the decision below conflicts with no relevant federal authority. Accordingly, no further review is warranted.

1. Petitioner first contends (Pet. 5-15) that the government warranted the quantity of timber and that the contracts' disclaimer of warranties is ineffective. This argument ignores the plain language of the contracts. It is well settled under the law of federal contracts that "[w]here the language of a contract is clear and unambiguous on its face, a court will assume that the meaning ordinarily ascribed to those words reflects the intention of the parties." *NRM Corp.* v. *Hercules Inc.*, 758 F.2d 676, 681 (D.C. Cir. 1985). Here, the contracts between petitioner and the government state that petitioner "shall be liable for the total purchase price even though quantity of timber actually cut * * * is less than the estimated volume" (Pet. App. A25 (emphasis omitted)). And plaintiff warranted that it entered into the contracts based on its own "inspection of the timber * * * and its opinion of the value thereof" (*id.* at A24 (emphasis omitted)). Hence, the contracts unambiguously reveal that the parties placed the risk on petitioner that the amount of timber harvested would be less than the estimated quantities.[2]

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[2] The timber industry was well aware of this risk allocation. In negotiations leading up to the standard contract, the timber industry attempted to obtain a warranty that the estimates would be at least 90% accurate. The government declined to make such a warranty. See *Cafall Bros. Forest Products, Inc.* v. *United States*, 678 F.2d 1071, 1077 (Ct. Cl.), cert. denied, 459 U.S. 908 (1982). Thus the "industry practice [is] plainly not to interpret Forest Service estimates of timber volumes as guarantees" (*ibid.*). In addition, the Claims Court found that the timber industry knows that estimates in BLM contracts have frequently been high since 1966.

Contrary to petitioner's claim (Pet. 12), the contracts do not have inconsistent clauses. They do not purport to disclaim warranties regarding the quantity of timber that are expressed elsewhere in the contract. The government simply made no such express warranties in the first place. Thus the court of appeals' decision is consistent with opinions (see *id.* at 12-15) holding that a general disclaimer of warranties does not alter a seller's express warranties.

Nor does the decision conflict with the line of decisions (see Pet. 7) holding that a party bidding on a government services contract may reasonably rely on the government's specifications. In *United States* v. *Atlantic Dredging Co.*, 253 U.S. 1 (1920), the principal case relied on by petitioner, the government misrepresented the nature of the material to be dredged pursuant to a contract. In that case, there was "a clear declaration of the belief of the Government that its representation was true" (*id.* at 10). Under those circumstances, the Court held that the government assumed the risk of additional costs if its representation regarding the dredging was inaccurate. The government received the benefits of the work and thus fairness dictated that the Government pay for the work (*id.* at 12).

In this case, by contrast, the government never purported to make any representation of the precise amount of timber that could be harvested. The government provided only estimates and petitioner expressly assumed the risk that the estimates were high. Thus the line of cases represented by *Atlantic Dredging Co.* did not require the court of appeals to ignore the plain intent of the parties in this case.

2. Petitioner next contends (Pet. 15-18) that the court of appeals misinterpreted the terms "more or less" and "approximately" that appeared in documents given to peti-

tioner prior to the bidding.[3] Petitioner, however, never identifies the contractual clauses that it claims were misinterpreted so that the terms may be placed in context and their meaning derived. Nor does petitioner specify where in the court's opinion the misinterpretation occurred.

Petitioner may be referring to the language in the BLM standard bid form that the successful bidder "is liable for total purchase price even though the quantity of timber cut * * * is *more or less* than the total estimated volume" (Pet. App. A26 (emphasis added)). The words "more or less" in this context do not mean "approximately." Rather, this clause plainly means that the purchaser must pay the full price whether the harvested amount is more than the estimated volume or less than the estimated volume (*i.e.*, regardless of the actual harvest).

3. Petitioner also argues that the court of appeals erred in not adopting the Uniform Commercial Code as the law to be applied in this case. It is well settled, however, that federal common law governs contracts with the United States for the sale of goods. See *Priebe & Sons, Inc.* v. *United States,* 332 U.S. 407, 411 (1947). In developing this body of federal law, courts often seek guidance from the Uniform Commercial Code. In this case, for example, the Claims Court considered (Pet. App. A37) the Uniform Commercial Code's section on unconscionability. But the Claims Court and the court of appeals were not required to view their role as simply interpreting the Uniform Commercial Code.

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[3] Petitioner's reliance on *Brawley* v. *United States,* 96 U.S. 168 (1878), for this argument is misplaced. The Court noted in *Brawley* that terms such as "about" are "not regarded as in the nature of a warranty, but only as an estimate of the probable amount" (*id.* at 171).

4. Finally, petitioner contends that the courts below erred in holding that the government acted in good faith and that the contracts were not unconscionable. Both of these contentions are meritless.

Contrary to petitioner's assertion (Pet. 25), the Claims Court did recognize that contracting parties have an obligation to act in good faith. See Pet. App. A29-A31. The court simply held that petitioner submitted no evidence that the government breached such an obligation in this case. As the Claims Court noted, there is "*not one scintilla* of evidence of concealment or bad faith proffered by" petitioner (*id.* at A32 (emphasis in original)). Petitioner points to nothing in the record indicating that the Claims Court's review of the record was wrong.

Nor does petitioner refer to any evidence to support its claim that the contracts were so unfair as to be unconscionable. The Claims Court aptly observed that "knowledgeable parties, in a competitive and commercial setting, simply agreed to allocate certain risks" (Pet. App. A39). The lower courts properly respected the risk-allocation bargain that was entered into "knowingly, freely, and by the conscious mutual decision of the parties" (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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